STATE OF MICHIGAN

COURT OF APPEALS

HEALING PLACE AT NORTH OAKLAND MEDICAL CENTER, HEALING PLACE, LTD, NEW START, INC, and EDGAR NAYLOR,	FOR PUBLICATION October 23, 2007 9:00 a.m.
Plaintiffs-Appellants,	
v	No. 272960 Oakland Circuit Court
ALLSTATE INSURANCE COMPANY,	LC No. 2005-065333-NF
Defendant-Appellee.	Official Reported Version

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

SMOLENSKI, P.J. (*dissenting*).

Because I conclude that the trial court erred when it granted summary disposition in favor of defendant, I respectfully dissent.

In the present case, plaintiffs alleged that they were entitled to compensation for services provided to defendant's insured. Under MCL 500.3107(1)(a), personal protection insurance benefits are payable for all "reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." In addition to the requirements imposed by MCL 500.3107(1)(a), MCL 500.3157 provides that

> [a] physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered.

In *Cherry v State Farm Mut Automobile Ins Co*, 195 Mich App 316, 320; 489 NW2d 788 (1992), the Court read MCL 500.3107 in conjunction with MCL 500.3157 and concluded that "the Legislature intended that only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit." Hence, in order for a charge to be compensable as a no-fault benefit, the charge must be reasonable, reasonably necessary for an injured person's care, recovery, or rehabilitation, and it must be lawfully rendered.

In its motion for summary disposition, defendant argued that The Healing Place at North Oakland Medical Center (THP at NOMC) was required to be licensed as a psychiatric hospital

unit, that The Healing Place, Ltd. (The Healing Place), had no license at all, and that New Start, Inc. (New Start), provided services that required a license to operate an adult foster-care facility. Defendant further argued that, because these entities did not have the requisite licenses, the services rendered by those entities were unlawful within the meaning of MCL 500.3157 and, therefore, not compensable. The trial court agreed with defendant.

Although plaintiffs bore the ultimate burden to prove that their charges were compensable under MCL 500.3107, see *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1990), because defendant was the moving party, it had the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(3). In order to meet that burden, at a minimum, defendant had to present evidence that the entities at issue provided services to Naylor under circumstances that required those entities to possess a specific type of license and that the entities did not possess the required license.

In its motion for summary disposition, defendant alleged that New Start provided services to Naylor as an adult foster-care facility. Further, defendant alleged that New Start did not have a license to operate an adult foster-care facility. In order to constitute an "adult foster care facility," New Start must provide foster care to adults who are aged, mentally ill, developmentally disabled, or physically disabled in such a way that they require ongoing supervision, but do not require continuous nursing care. MCL 400.703(4). Furthermore, "foster care" is defined as "the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation." MCL 400.704(6).

To support its claim that New Start unlawfully operated an adult foster-care facility, defendant attached a copy of a license for residential substance-abuse treatment issued to THP at NOMC. However, this license alone does not establish that New Start does not possess a license to operate an adult foster-care facility. Defendant also attached a letter from a staff member at New Start to Naylor's parole officer that states that Naylor had been admitted to the inpatient hospital-based program run by The Healing Place, but had since matriculated and was now participating in the community-based and day treatment programs provided by New Start. While this letter indicates that Naylor was receiving some services from New Start, it does not specify the nature of those services, the location where those services were provided, or the circumstance under which the services were provided. As such, these documents were insufficient to establish that New Start provided services as an adult foster-care facility without a license.

In its reply to plaintiffs' response, defendant also cited and attached the deposition testimony of Dr. Thomas Kane, who was a contract psychiatrist with New Start from 2003 to May 2004. Kane testified that, to his knowledge, New Start supervised the treatment of a person named Barbara Clark and also stated that he *assumed* that New Start provided hygiene, grooming, maintenance, and medication services to all its patients. Defendant did not explain how Barbara Clark's treatment was relevant to this case and failed to explain how Kane's assumptions about the services provided during the period of his contractual relationship with New Start established the nature of the services provided by New Start after Kane terminated his relationship with New Start. Finally, defendant cited the testimony of Roman Frankel, who

apparently is an owner of at least one of the entities at issue.[1] According to defendant, Frankel testified that New Start's staff was on call 24 hours a day. However, the attached pages of the deposition contain no such testimony.[2]

Defendant also failed to provide any evidence concerning the services provided by The Healing Place and how the provision of those services was unlawful. Although defendant attached the letter from New Start that indicated that Naylor had been admitted to a hospital-based inpatient program run by The Healing Place, the letter is by itself inadequate to establish the nature and circumstances under which the services were provided and whether those services were provided without a license. In a footnote in its reply brief, defendant does argue that The Healing Place is interchangeable with New Start and may be the entity that runs the apartment-based program, but failed to attach any evidence in support of that assertion.[3]

On the basis of the evidence presented by defendant in support of its motion for summary disposition, I conclude that defendant failed to meet its initial burden to produce evidence from which the trial court could determine that New Start and The Healing Place unlawfully provided services to Naylor. *Quinto*, *supra* at 362. Because defendant failed to meet its initial burden of production, plaintiffs were not required to rebut defendant's evidence and defendant was not entitled to summary disposition of the claims by those entities on that basis.

Defendant also claimed that THP at NOMC provided services to Naylor as a psychiatric unit without having a license to operate as a psychiatric unit. In order to establish this, defendant needed to present evidence that THP at NOMC operated as a "unit of a general hospital that provides inpatient services for individuals with serious mental illness or serious emotional disturbance." MCL 330.1100c(9). In support of this claim, defendant presented evidence that Naylor had a serious mental illness and was admitted to The Healing Place's inpatient, hospital-based program. In addition, defendant attached invoices, which clearly indicate that Naylor was a resident patient of the facility and received some psychiatric services while admitted to the program. Frankel also testified that The Healing Place provided various levels of care and that the "hospital" charged a per diem rate that included neuropsychological and neuropsychiatric

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[1] The relationship between New Start, The Healing Place, and THP at NOMC and the programs that they operated is not described in the record or the parties' briefs.

[2] In the portion of Frankel's testimony attached to defendant's motion for summary disposition, Frankel stated that New Start was the administrative arm of The Healing Place, but did provide some patient services. However, there is no testimony that explains specifically what those services were.

[3] Plaintiffs presented the affidavit of Julius Ballew, who was employed by the Department of Social Services as a consultant on an adult foster-care licensing. In his affidavit, Ballew stated that he was familiar with community-based apartments used for the rehabilitation of individuals with brain injuries and concluded that The Healing Place was a community-based apartment program. However, even if defendant could rely on this affidavit to satisfy its initial burden of production, this averment alone would not be enough to establish that the apartment facility provided services that required it to be licensed as an adult foster-care facility.

assessments, nursing care, room and board, transportation services, and some group therapies. Further, Frankel stated that the facility was licensed as a residential substance-abuse program. This evidence was sufficient to support an inference that THP at NOMC operated as a psychiatric unit even though it only had a license to operate as a residential substance-abuse program. Nevertheless, even assuming that THP at NOMC was operating as a psychiatric unit without the requisite license, this fact does not necessarily entitle defendant to summary disposition of THP at NOMC's claims.

In *Miller v Allstate Ins Co (On Remand)*, 275 Mich App 649; 739 NW2d 675 (2007), the Court examined whether a defect in the corporate form of an entity that provided services to an injured person insured by Allstate rendered the provision of services unlawful within the meaning of MCL 500.3157. In holding that the defect did not render the services unlawful, the Court reasoned:

> While the language of MCL 500.3157 speaks of a clinic or institution lawfully rendering treatment, treatment is invariably and necessarily performed or rendered by employees and personnel; the *treatment itself* has nothing to do with corporate formation issues. Moreover, the inclusion of "physician, hospital, clinic or other person or institution" in the statutory language is chiefly for purposes of identifying those entities and persons that "may charge a reasonable amount for the products, services and accommodations rendered." MCL 500.3157. While Allstate argues that the Legislature included entities (hospitals, clinics, and institutions) in the statute because the entities need to be lawfully rendering treatment independent from any consideration of whether individual employees or agents who actually treat patients are doing so, we read the inclusion of the entities in the statutory language as merely indicating that those entities can be paid by insurers for services provided at their institutions. Of course, each of these entities must be lawfully rendering treatment, but, again, the treatment is rendered through their personnel. Furthermore, the Legislature's focus on the lawfulness of rendering treatment as opposed to the lawfulness of an entity's corporate structure indicates the Legislature's desire not to burden individuals seeking medical treatment, ostensibly covered by insurance, from having to engage in an extensive and in-depth review and analysis regarding an entity's formation and related incorporation issues. The goal of the no-fault act was to provide accident victims with adequate, assured, and prompt reparation for their losses. *Nelson v Transamerica Ins Services*, 441 Mich 508, 514; 495 NW2d 370 (1992). This goal would be defeated by interpreting MCL 500.3157 as advocated by Allstate. [*Miller, supra* at 657-658 (emphasis in original).]

Although the holding in *Miller* applied to defects in corporate structure, I conclude that the reasoning applies equally to issues involving the licensing of entities.

The stated purpose behind establishing licensing requirement for psychiatric units is to ensure that the units "provide the facilities and the ancillary supporting services necessary to maintain a high quality of patient care." MCL 330.1134(1). Hence, the focus of the license for a psychiatric unit is not on the individual provision of a particular service, but rather on broader

issues that may affect the provision of the services. Entities such as THP at NOMC can only provide services through their agents. Thus, whether a particular service is being properly provided will more directly depend on the skill and training of the agent acting on behalf of the entity. Further, the fact that an entity has a psychiatric-unit license does not relieve the individual agents of their obligation to have the requisite license to perform the actual services rendered. For these reasons, I conclude that the lack of a license to operate as a psychiatric unit does not necessarily render the services actually provided by THP at NOMC unlawful. Instead, as in *Miller*, *supra*, I would hold that the relevant inquiry in determining whether a particular service was lawfully rendered for purposes of MCL 500.3157 depends on whether the individual performing the actual service is properly licensed. Because there is no evidence that the actual services performed by the agents of THP at NOMC were performed without proper licensing, I conclude that defendant was not entitled to summary disposition on this basis.

I also disagree with defendant's argument that summary disposition was appropriate because plaintiffs failed to present evidence that the entities actually rendered compensable services. Defendant apparently conceded that each of the entities provided some services to Naylor. Indeed, defendant only argued that the services were (1) not related to the injuries caused by the accident, (2) not lawfully rendered, and (3) not reasonable. Because defendant did not challenge whether the services were actually provided to Naylor, plaintiffs cannot be faulted for failing to present evidence that the services were rendered. Therefore, to the extent that the trial court determined that summary disposition was appropriate because plaintiffs failed to present evidence of the services provided, I would conclude that it erred.

Defendant also argued that summary disposition was appropriate because plaintiffs only treated Naylor for conditions that predated the injuries from the car accident. In support of this argument, defendant attached records that indicate that Naylor had suffered a closed head injury as a child and had a substance-abuse problem before the accident in question. However, the medical records also indicate that Naylor had decreased impulse control after the automobile accident that may have exacerbated his substance-abuse problem. In addition, the records indicate that the closed head injury he suffered in the accident may have increased his mental deficits. Hence, there is a question of fact regarding whether the services provided were reasonably necessary to treat Naylor for the injuries he suffered during the car accident as required by MCL 500.3107(1)(a).

Finally, defendant argued that plaintiffs' fees were unreasonable. Although the trial court did not address this issue, on review de novo, I would conclude that this argument is unavailing. Defendant failed to present any evidence concerning the reasonableness of the fees plaintiffs charged for the services provided to Naylor. Instead, defendant merely argued that plaintiffs would have to prove that their fees were reasonable and noted that plaintiffs had not presented any evidence that the fees were reasonable. However, as noted above, defendant has the initial burden to provide evidence from which the trial court could conclude that the fees were unreasonable. See *Quinto*, *supra* at 362. Absent the presentation of such evidence, defendant is not entitled to summary disposition on the issue of reasonableness. See MCR 2.116(G)(4). Furthermore, although defendant would not be liable for any medical expense to the extent that the expense was unreasonable, see *Nasser*, *supra* at 49, defendant would still be liable for the

reasonable cost of the necessary services provided to Naylor. Therefore, this would not warrant outright dismissal of plaintiffs' claims.

For these reasons, I conclude that the trial court erred when it determined that defendant was entitled to summary disposition in its favor. Therefore, I would reverse and remand this case for further proceedings.

/s/ Michael R. Smolenski